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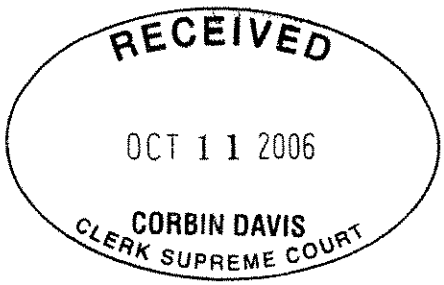
State of Michigan
Judicial Tenure Commission

October 9, 2006



Corbin Davis
Michigan Supreme Court
925 W. Ottawa
Lansing, Michigan 48915

Re: **ADM File No. 2003-21**

Dear Mr. Davis,

The Judicial Tenure Commission ("the Commission") has completed its consideration of the alternatives to MCR 9.207 that the Court has published for comment. The Commission prefers that the Court make no changes to the present rule, as the system currently in place best serves the goal of preserving the integrity of the judiciary while at the same time preserving the confidentiality of matters. Nevertheless, if the Court deems change necessary, the Commission prefers Alternative "A" (where an admonished judge may "appeal" the admonition to the Supreme Court) and strongly urges that the Court ***not*** promulgate Alternative "B" (dispensing with dismissals with explanation, caution and admonition.). The Commission's reasons are explained below.

A. A RULE CHANGE WOULD NOT IMPROVE THE DISCIPLINARY SYSTEM

Between 1969 and 1984, the Commission had only two options: dismiss a request for investigation, or issue a formal complaint. In 1984, the Court amended the rules and authorized the use of letters of dismissal with admonishment. These letters of admonishment became alternatives to formal complaints, and then they, too, seemed to develop a status of being "harsh." The Commission then came up with a stepped-system of dismissal, from the straight dismissal, to a dismissal with an explanation, to a dismissal with caution, to the dismissal with admonishment or admonition (those two terms were used interchangeably.)

The current system works well. It provides for the Commission to investigate allegations of misconduct, and prosecutions result in those matters serious enough to warrant it. The Commission also summarily dismisses those matters that clearly do not warrant further

investigation. These dismissals with explanation, caution or admonition serve the important goal of allowing the Commission to dismiss cases while at the same time educating judges on avoiding improper conduct. The Commission views a dismissal with an admonishment as a dismissal; the admonishment portion is a reminder to the judge of something forgotten or disregarded through an expression of disapproval of such conduct.

The Commission is a unified disciplinary organization, meaning that at some point in the proceedings it shifts from being the investigator to the adjudicator, and the Commission's executive director shifts from his role as chief investigator to prosecutor. The dismissals under MCR 9.207 are done while the Commission is still wearing its investigative/prosecutorial hat. In that capacity, the Commission's decision *not* to prosecute a particular judge should not be subject to further scrutiny.

The Commission recognizes that it has, in the past, inartfully and inaccurately referred to letters of dismissal with explanation, caution, or admonition as "discipline" or "sanctions." The Commission erred in so doing, because these forms of dismissals are not discipline or a punishment; rather they are an expression of warning. The Commission views an admonition in the judiciary disciplinary system the same way an admonition is used in the *attorney* discipline system: "[a]n admonition does not constitute discipline . . ." MCR 9.106(6). Let there be no doubt: the Commission acknowledges that only the Supreme Court has the constitutional authority to discipline or sanction a judicial officer.

A major goal of the judicial disciplinary system is to protect the integrity of the judiciary and preserve the public's confidence in the judicial system. One way the Commission fulfills that obligation is by pointing out to judges that their conduct may have violated the Code of Judicial Conduct in an effort to assist that judge to refrain from future violations. The system of explanations, cautions, and admonishments is designed to do just that without intruding on the Court's constitutional prerogative.

B. ALTERNATIVE A PRESERVES THE INTEGRITY OF THE JUDICIAL DISCIPLINARY SYSTEM

If change occurs, Alternative "A" preserves the essential workings of the judicial disciplinary system while giving the judges the option of challenging the Commission's admonition. In essence, the judge "can roll the dice," by getting a public decision, either vindicating the alleged misconduct, or risking a public condemnation by the Supreme Court for the error. If the judge challenges the Commission's admonition, the matter becomes public one way or the other. If the judge chooses to accept the admonition, the matter remains confidential.

Commission proceedings "are intended to be remedial, not penal." *In re Noecker*, 472 Mich 1 (2005) (Young, J., concurring, p 2, footnote omitted). Not surprisingly, the Commission has developed a certain expertise in dealing with the types of cases that may not necessarily warrant formal action but should not be ignored, either. The Court sets policy for the court

system, but it leaves the day-to-day administration to SCAO. Similarly, it sets policy on what constitutes "judicial misconduct" by promulgating court rules, Canons of Judicial Conduct, imposing or rejecting discipline in matters before the Court on recommendation of the Commission, and even in issuing opinions and orders in non-discipline cases. It follows, then, that the day-to-day activity of dealing with errant judges should remain with the Commission, while the Court continues to set policy in the field of judicial conduct, as well as actually imposing discipline when warranted.

C. ALTERNATIVE B IS LIKELY LEAD TO A GREATER NUMBER OF FORMAL COMPLAINTS

Alternative "B" presents a stark choice: dismissal or public discipline. While that binary option may sound simpler, in reality it is not. Having only those two options would eliminate the letters of explanation, caution, and admonition, as well as the private censure from the Court, but they would not necessarily promote greater confidence in the integrity of the judiciary.

It is likely that there would be more formal complaints issued for acts of misconduct that might not otherwise have resulted in formal complaints. For example, for purposes of this response, it is a good-faith estimate that 10% of the 113 cases that were resolved in the last five years with dismissals with admonishment, caution, or explanation) for whatever reason (first-time offender, borderline misconduct, *etc.*) could very well have resulted in formal complaints. This translates into an additional two formal complaints per year. The Commission has averaged two formal complaints a year since its inception. Having to choose between the only two remaining alternatives – dismissal or formal complaint – could very well force the number of formal complaints to double.

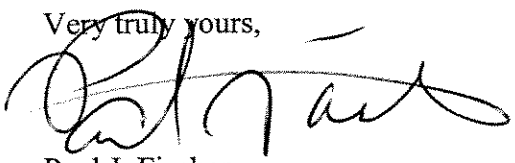
The doubling of the number of formal complaints cannot but have a deleterious effect on the public's perception of the integrity of the judiciary. Moreover, making public cases out of grievances that otherwise might have been handled confidentially will necessarily re-set the "equivalency bar". The Court requires that "[t]he commission shall undertake to ensure that the action it is recommending in individual cases **is** reasonably proportionate to the conduct of the respondent, and **reasonably equivalent to the action that has been taken previously in equivalent cases.**" (emphasis supplied.) Taking the middling cases (those that would not otherwise be taken public due to the availability of a range of confidential disposition options) would cause the proportionality and equivalency standards to be lowered to cover all those new situations.

The Commission does not rush to issue formal complaints. Rather, it dismisses matters with increasingly harsh warnings – from an "explanation" to a "caution" to an "admonition" – that are, nonetheless, dismissals. Thus, for example, the Commission has admonished (1) an experienced judge who developed docket management problems (and was then able to overcome them); (2) an inexperienced judge who had developed some delay issues, but then worked with the Commission to develop a better management style; and (3) another experienced judge who

was making inappropriate comments in court. Admonishments, cautions, and explanations serve a useful purpose, as they can be the conduits of changed behavior, and they protect the integrity of the judiciary and the public.

The Commission thanks the Court for publishing its proposal for comment. The Commission urges the Court to leave the rule as it is, as no change is warranted. If, however, change is on the way, the Commission urges the Court to adopt Alternative "A" and to close the file on Alternative "B."

Very truly yours,



Paul J. Fischer
Executive Director and
General Counsel

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cc: To All Commission Members

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